

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

NANCY COGGESHALL,

Plaintiff(s),

v.

NANCY A. BERRYHILL, ACTING
 COMMISSIONER OF SOCIAL SECURITY,

Defendant(s).

Case No. 2:17-cv-01299-KJD-NJK

REPORT AND RECOMMENDATION

(Docket Nos. 18, 22, 27)

This case involves judicial review of administrative action by the Commissioner of Social Security (“Commissioner”) denying Plaintiff’s application for disability insurance benefits pursuant to Titles II and XVI of the Social Security Act. Currently before the Court is Plaintiff’s Motion for Reversal and/or Remand. Docket No. 18. The Commissioner filed a response in opposition and a Cross-Motion to Affirm. Docket Nos. 22-23. Plaintiff filed a reply. Docket No. 24; *see also* Docket No. 25 (errata). This action was referred to the undersigned magistrate judge for a report of findings and recommendation.

This matter is properly resolved without a hearing. *See* Local Rule 78-1. Accordingly, the motion for a hearing (Docket No. 27) is **DENIED**.

I. STANDARDS

A. Judicial Standard of Review

The Court’s review of administrative decisions in social security disability benefits cases is governed by 42 U.S.C. § 405(g). *Akopyan v. Barnhart*, 296 F.3d 852, 854 (9th Cir. 2002). Section

1 405(g) provides that, “[a]ny individual, after any final decision of the Commissioner of Social Security
2 made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a
3 review of such decision by a civil action . . . brought in the district court of the United States for the
4 judicial district in which the plaintiff resides.” The Court may enter, “upon the pleadings and transcript
5 of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social
6 Security, with or without remanding the cause for a rehearing.” *Id.*

7 The Commissioner’s findings of fact are deemed conclusive if supported by substantial evidence.
8 42 U.S.C. § 405(g). To that end, the Court must uphold the Commissioner’s decision denying benefits
9 if the Commissioner applied the proper legal standard and there is substantial evidence in the record as
10 a whole to support the decision. *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005). The Ninth
11 Circuit defines substantial evidence as “more than a mere scintilla but less than a preponderance; it is
12 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”
13 *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). In determining whether the Commissioner’s
14 findings are supported by substantial evidence, the Court reviews the administrative record as a whole,
15 weighing both the evidence that supports and the evidence that detracts from the Commissioner’s
16 conclusion. *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998).

17 Under the substantial evidence test, the Commissioner’s findings must be upheld if supported
18 by inferences reasonably drawn from the record. *Batson v. Comm’r, Soc. Sec. Admin.*, 359 F.3d 1190,
19 1193 (9th Cir. 2004). When the evidence will support more than one rational interpretation, the Court
20 must defer to the Commissioner’s interpretation. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005).
21 Consequently, the issue before this Court is not whether the Commissioner could reasonably have
22 reached a different conclusion, but whether the final decision is supported by substantial evidence.

23 It is incumbent on the ALJ to make specific findings so that the Court does not speculate as to
24 the basis of the findings when determining if the Commissioner’s decision is supported by substantial
25 evidence. The ALJ’s findings should be as comprehensive and analytical as feasible and, where
26 appropriate, should include a statement of subordinate factual foundations on which the ultimate factual
27 conclusions are based, so that a reviewing court may know the basis for the decision. *See, e.g., Gonzalez*
28 *v. Sullivan*, 914 F.2d 1197, 1200 (9th Cir. 1990).

1 B. Disability Evaluation Process

2 The individual seeking disability benefits bears the initial burden of proving disability. *Roberts*
3 *v. Shalala*, 66 F.3d 179, 182 (9th Cir 1995). To meet this burden, the individual must demonstrate the
4 “inability to engage in any substantial gainful activity by reason of any medically determinable physical
5 or mental impairment which can be expected . . . to last for a continuous period of not less than 12
6 months.” 42 U.S.C. § 423(d)(1)(A). More specifically, the individual must provide “specific medical
7 evidence” in support of his claim for disability. *See, e.g.*, 20 C.F.R. § 404.1514. If the individual
8 establishes an inability to perform his prior work, then the burden shifts to the Commissioner to show
9 that the individual can perform other substantial gainful work that exists in the national economy.
10 *Reddick*, 157 F.3d at 721.

11 The ALJ follows a five-step sequential evaluation process in determining whether an individual
12 is disabled. *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987) (citing 20 C.F.R. §§ 404.1520, 416.920). If
13 at any step the ALJ determines that he can make a finding of disability or nondisability, a determination
14 will be made and no further evaluation is required. *See Barnhart v. Thomas*, 540 U.S. 20, 24 (2003);
15 *see also* 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). The first step requires the ALJ to determine
16 whether the individual is currently engaging in substantial gainful activity (“SGA”). 20 C.F.R. §§
17 404.1520(b), 416.920(b). SGA is defined as work activity that is both substantial and gainful; it involves
18 doing significant physical or mental activities usually for pay or profit. 20 C.F.R. §§ 404.1572(a)-(b),
19 416.972(a)-(b). If the individual is currently engaging in SGA, then a finding of not disabled is made.
20 If the individual is not engaging in SGA, then the analysis proceeds to the second step.

21 The second step addresses whether the individual has a medically determinable impairment that
22 is severe or a combination of impairments that significantly limits him from performing basic work
23 activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). An impairment or combination of impairments is not
24 severe when medical and other evidence establish only a slight abnormality or a combination of slight
25 abnormalities that would have no more than a minimal effect on the individual’s ability to work. 20
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1 C.F.R. §§ 404.1521, 416.921; Social Security Rulings (“SSRs”) 85-28 and 96-3p.¹ If the individual does
2 not have a severe medically determinable impairment or combination of impairments, then a finding of
3 not disabled is made. If the individual has a severe medically determinable impairment or combination
4 of impairments, then the analysis proceeds to the third step.

5 The third step requires the ALJ to determine whether the individual’s impairments or
6 combination of impairments meet or medically equal the criteria of an impairment listed in 20 C.F.R.
7 Part 404, Subpart P, Appendix 1. 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925,
8 416.926. If the individual’s impairment or combination of impairments meet or equal the criteria of a
9 listing and meet the duration requirement (20 C.F.R. §§ 404.1509, 416.909), then a finding of disabled
10 is made. 20 C.F.R. §§ 404.1520(d), 416.920(d). If the individual’s impairment or combination of
11 impairments does not meet or equal the criteria of a listing or meet the duration requirement, then the
12 analysis proceeds to the next step.

13 Before considering step four of the sequential evaluation process, the ALJ must first determine
14 the individual’s residual functional capacity. 20 C.F.R. §§ 404.1520(e), 416.920(e). The residual
15 functional capacity is a function-by-function assessment of the individual’s ability to do physical and
16 mental work-related activities on a sustained basis despite limitations from impairments. SSR 96-8p.
17 In making this finding, the ALJ must consider all of the symptoms, including pain, and the extent to
18 which the symptoms can reasonably be accepted as consistent with the objective medical evidence and
19 other evidence. 20 C.F.R. §§ 404.1529 and 416.929; SSRs 96-4p, 16-3p. An ALJ will consider the
20 claimant’s statements regarding the intensity, persistence, and limiting effects of symptoms, and will
21 further evaluate whether the statements are consistent with objective medical evidence and the other
22 evidence. SSR 16-3p. The ALJ must also consider opinion evidence in accordance with the
23 requirements of 20 C.F.R. §§ 404.1527 and 416.927 and SSRs 96-2p, 96-5p, 96-6p, and 06-3p.

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26 ¹ SSRs constitute the Social Security Administration’s official interpretations of the statute it
27 administers and its regulations. *See Bray v. Comm’r, Soc. Sec. Admin.*, 554 F.3d 1219, 1224 (9th Cir. 2009);
28 *see also* 20 C.F.R. § 402.35(b)(1). They are entitled to some deference as long as they are consistent with
the Social Security Act and regulations. *Bray*, 554 F.3d at 1224.

The fourth step requires the ALJ to determine whether the individual has the residual functional capacity to perform his past relevant work (“PRW”). 20 C.F.R. §§ 404.1520(f), 416.920(f). PRW means work performed either as the individual actually performed it or as it is generally performed in the national economy within the last 15 years or 15 years prior to the date that disability must be established. In addition, the work must have lasted long enough for the individual to learn the job and performed at SGA. 20 C.F.R. §§ 404.1560(b), 404.1565, 416.960(b), 416.965. If the individual has the residual functional capacity to perform his past work, then a finding of not disabled is made. If the individual is unable to perform any PRW or does not have any PRW, then the analysis proceeds to the fifth and last step.

The fifth and final step requires the ALJ to determine whether the individual is able to do any other work considering his residual functional capacity, age, education, and work experience. 20 C.F.R. §§ 404.1520(g), 416.920(g). If he is able to do other work, then a finding of not disabled is made. Although the individual generally continues to have the burden of proving disability at this step, a limited burden of going forward with the evidence shifts to the Commissioner. The Commissioner is responsible for providing evidence that demonstrates that other work exists in significant numbers in the national economy that the individual can do. *Lockwood v. Comm’r, Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010).

II. BACKGROUND

A. Procedural History

On June 12, 2013, Plaintiff filed an application for supplemental security income alleging that she became disabled on July 21, 2012. *See, e.g.*, Administrative Record (“A.R.”) 194-202. Plaintiff’s claim was denied initially on November 18, 2013, and upon reconsideration on June 4, 2014. A.R. 71, 103-07, 111-13. On July 25, 2014, Plaintiff filed a request for a hearing before an Administrative Law Judge (“ALJ”). A.R. 120-22. On April 17, 2015, Plaintiff filed a request that the Commissioner consider whether she was eligible for disability insurance benefits. A.R. 174. On May 20, 2015, Plaintiff amended her onset date to June 12, 2013. A.R. 294. On June 1, 2015, Plaintiff, Plaintiff’s attorney, and a vocational expert appeared for a hearing before ALJ Cynthia Hoover. *See* A.R. 43-70. On September 15, 2015, the ALJ issued an unfavorable decision finding that Plaintiff had not been under

1 a disability, as defined by the Social Security Act, through the date of the decision. A.R. 25-42. On
2 March 13, 2017, the ALJ's decision became the final decision of the Commissioner when the Appeals
3 Council denied Plaintiff's request for review. A.R. 1-6.

4 On May 9, 2017, Plaintiff commenced this action for judicial review pursuant to 42 U.S.C. §
5 405(g). *See* Docket No. 1.

6 B. The Decision Below

7 The ALJ's decision followed the five-step sequential evaluation process set forth in 20 C.F.R.
8 §§ 404.1520 and 416.920. A.R. 25-42. At step one, the ALJ found that Plaintiff meets the insured status
9 requirements of the Social Security Act through December 30, 2018, and has not engaged in substantial
10 gainful activity since June 12, 2013. A.R. 30. At step two, the ALJ found that Plaintiff has the
11 following severe impairments: degenerative changes of the cervical spine with moderate right
12 neuroforaminal narrowing from C4 through C6 and obesity. A.R. 30-32. At step three, the ALJ found
13 that Plaintiff does not have an impairment or combination of impairments that meets or medically equals
14 the severity of one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. A.R. 33.

15 The ALJ found that Plaintiff has the residual functional capacity to perform light work as defined
16 in 20 C.F.R. §§ 404.1567(b) and 416.967(b) with: lifting and carrying 20 pounds occasionally and 10
17 pounds frequently; sitting, standing, and/or walking 6 hours in an 8-hour workday; but that she must
18 avoid concentrated exposure to extreme heat, extreme cold, and hazards such as dangerous machinery
19 and heights. A.R. 33-36. At step four, the ALJ found Plaintiff is capable of performing her past relevant
20 work as a marketing coordinator, marketing business owner, and office manager. A.R. 37. Based on
21 all of these findings, the ALJ found Plaintiff not disabled and denied the applications for a period of
22 disability and disability insurance benefits and supplemental security income. *See id.*

23 **III. ANALYSIS AND FINDINGS**

24 Plaintiff challenges the Commissioner's decision on several grounds. First, Plaintiff argues that
25 the ALJ erred in failing to find Plaintiff's Lyme disease to be a severe impairment. Second, Plaintiff
26 argues that the ALJ erred in giving no weight to the opinion of Melanie Gisler. Third, Plaintiff argues
27 that the ALJ erred in giving no weight to portions of the opinion of Orlandis Wells. Fourth, Plaintiff
28 argues that the ALJ erred in giving little weight to the opinion of Gina Abbeduto. Fifth, Plaintiff argues

1 that the ALJ erred in giving significant weight to Khalid Kamal. Sixth, Plaintiff argues that the ALJ
 2 erred in finding Plaintiff's testimony as to her limitations not fully credible. Seventh, Plaintiff argues
 3 that the ALJ erred in finding third-party testimony not fully credible. The Court will address each
 4 argument below in turn.

5 A. Lyme Disease as a Severe Impairment

6 Plaintiff argues that the ALJ erred at step two of her analysis by not finding Plaintiff's Lyme
 7 disease to constitute a severe impairment. Docket No. 18-1 at 19-21. The Commissioner counters that,
 8 *inter alia*, any error was harmless. Docket No. 22 at 5-6. The Commissioner has the better argument.

9 Plaintiff bears the burden of establishing that an error is harmful. *Molina v. Astrue*, 674 F.3d
 10 1104, 1101 (9th Cir. 2012). "[T]he Ninth Circuit has held when the ALJ has resolved Step Two in a
 11 claimant's favor, any error in designating specific impairments as severe does not prejudice a claimant
 12 at Step Two." *Hase v. Colvin*, 207 F. Supp. 3d 1174, 1180 (D. Or. 2016) (citing *Burch v. Barnhart*, 400
 13 F.3d 676, 682 (9th Cir. 2005)); *see also Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007) (any error
 14 at step two in omitting a limitation was harmless when that limitation was considered at step four). In
 15 this case, the ALJ found in Plaintiff's favor at step two and proceeded to consider her Lyme disease as
 16 she conducted the sequential analysis. *See* A.R. 30, 32, 34. Hence, any error by the ALJ in not finding
 17 Plaintiff's Lyme disease to be severe at step two was harmless.

18 B. Melanie Gisler

19 Plaintiff next argues that the ALJ erred in discounting the opinion of her treating physician, Dr.
 20 Gisler. Docket No. 18-1 at 21-22. The Commissioner counters that the ALJ properly discounted Dr.
 21 Gisler's opinion as so extreme as to be implausible, lacking medical support, inconsistent with Plaintiff's
 22 minimal treatment for Lyme disease, and inconsistent with Plaintiff's daily activities. Docket No. 22
 23 at 6-9. The Commissioner has the better argument.

24 A treating physician's medical opinion as to the nature and severity of an individual's impairment
 25 is entitled to controlling weight when that opinion is well-supported and not inconsistent with other
 26 substantial evidence in the record. *See, e.g., Edlund v. Massanari*, 253 F.3d 1152, 1157 (9th Cir. 2001).
 27 Even when not controlling, such opinions are entitled to deference and must be weighed properly
 28 pursuant to applicable regulations. *See, e.g., id.* Nonetheless, the opinion of a treating physician is not

1 necessarily conclusive as to the existence of an impairment or the ultimate issue of a claimant's
2 disability. *See, e.g., Thomas v. Barnhart*, 278 F.3d 947, 956 (9th Cir. 2002). If a treating doctor's
3 opinion is contradicted by another doctor, the ALJ may reject the treating doctor's opinion by providing
4 "specific and legitimate reasons" supported by substantial evidence in the record. *See, e.g., Lester v.*
5 *Chater* 81 F.3d 821, 830 (9th Cir. 1995).

6 In this case, the ALJ found that, *inter alia*, "the limitations set forth in [Dr. Gisler's] opinion are
7 so extreme as to appear implausible which suggests patient advocacy and discredits the entire opinion."
8 A.R. 35. In Dr. Gisler's medical source statement, she indicates that in an 8-hour workday Plaintiff
9 could sit for no more than one hour, stand for no more than one hour, and walk for no more than one
10 hour. A.R. 549. The medical source statement also indicates that Plaintiff could not lift any object of
11 any weight, could not carry any object of any weight, could not bend, could not squat, could not crawl,
12 could not climb, and could not reach above shoulder level. A.R. 550. Moreover, the medical source
13 statement indicates that Plaintiff experienced those limitations since 2009 (or for roughly five years as
14 of the time of the report). A.R. 552. These limitations stand in stark contrast with the record. For
15 example, Plaintiff's own testimony revealed that she worked through 2013, goes shopping for up to three
16 hours at a time and up to three times per week, cooks her own meals, cleans her kitchen, does laundry,
17 washes dishes, vacuums and cleans her apartment, drives a car, sews, had been going to a meditation
18 group bi-monthly, and spends four to six hours sitting each day. *See, e.g., A.R. 52-57*. The ALJ did not
19 err in finding Dr. Gisler's opinion so implausible that it be discounted in its entirety. *See, e.g., Rollins*
20 *v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001).

21 Plaintiff also contends that the ALJ erred in her treatment of Dr. Gisler's opinion because her
22 decision indicates that there "are no treatment records from Dr. Gristler [sic] in the evidence of record,"
23 A.R. 35, even though the record does contain treatment notes from Dr. Gisler in relation to Lyme disease
24 testing, A.R. 457-70. Nonetheless, the ALJ elsewhere acknowledged Plaintiff's Lyme disease diagnosis,
25 A.R. 34, and the Commissioner counters that no showing has been made by Plaintiff that the notes
26 identified would change the outcome here, Docket No. 22 at 9. The Court finds that Plaintiff has failed
27 to show that any error on this basis was other than harmless given the ALJ's proper discounting of Dr.
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Gisler's opinion based on the implausibility of the limitations set out therein as outlined above. *See Molina*, 674 F.3d at 1101 (the claimant bears the burden of establishing that an error is harmful).

The ALJ did not err in discounting Dr. Gisler's opinion.

C. Orlandis Wells

Plaintiff next argues that the ALJ erred in discounting part of the opinion of another treating physician, Dr. Wells. Docket No. 18-1 at 22-24.² In particular, Plaintiff contends that the ALJ erred in failing to articulate specific and legitimate reasons for discounting the standing, sitting, and manipulative limitations identified by Dr. Wells because the ALJ failed to adequately account for Plaintiff's Lyme disease. *Id.* The Commissioner counters that the ALJ properly discounted these portions of Dr. Wells' opinion, and that Plaintiff's generalized assertions of possible limitations caused by Lyme disease do not show otherwise. Docket No. 22 at 9-10. The Commissioner has the better argument.

The ALJ rejected the above limitations because they were inconsistent with Plaintiff's own testimony, including that she was able to work in 2013, run errands for three hours at a time, and could sew. A.R. 35. Substantial evidence exists to support those findings, *see, e.g.*, A.R. 52, 56, 57, and an ALJ may discount a treating physician's opinion when it is inconsistent with the Plaintiff's level of daily activity, *see, e.g., Rollins*, 261 F.3d at 856. Plaintiff's submission of medical literature that Lyme disease may impact the above limitations does not render it improper for the ALJ to have discounted Dr. Wells' opinion as inconsistent with Plaintiff's testimony as to her daily activities.

The ALJ did not err in discounting parts of Dr. Wells' opinion.

D. Gina Abbeduto

Plaintiff next argues that the ALJ erred in discounting the findings of Gina Abbeduto, a licensed clinical professional. Docket No. 18-1 at 24-25. The Commissioner counters that the ALJ properly discounted Ms. Abbeduto's findings. Docket No. 22 at 11-13. As an initial matter, neither party has

² To the extent Plaintiff is arguing that an ALJ is not permitted to accord weight to some aspects of a medical opinion and reject other aspects, *see* Docket No. 18-1 at 22, the Court disagrees. "Ninth Circuit case law mak[es] clear that an ALJ is generally not required to adopt a physician's opinion in its entirety and can properly reject portions of it." *Hawley v. Berryhill*, Case No. 2:16-cv-01049-RFB-NJK, 2017 WL 2712939, at *5 (D. Nev. June 23, 2017) (citing *Magallanes v. Bowen*, 881 F.2d 747, 753-54 (9th Cir. 1989)), *adopted*, 2017 WL 3457108 (D. Nev. Aug. 9, 2017)).

1 accurately depicted the opinions of Ms. Abbeduto or the reasons articulated by the ALJ in discounting
2 them. Ms. Abbeduto drafted two separate opinions, one dated October 20, 2013 that was co-signed by
3 Dr. Richard Pruitt (A.R. 383) and one dated April 30, 2015 that was not co-signed by Dr. Richard Pruitt
4 (A.R. 567-71). The ALJ discounted the 2013 opinion because the record reflected that at the time it was
5 written Ms. Abbeduto had seen Plaintiff only twice and Dr. Pruitt had never seen Plaintiff. A.R. 32. The
6 ALJ discounted the 2015 opinion because the severe limitations identified therein were not supported
7 by Ms. Abbeduto's treatment records. *Id.* The ALJ also found that the 2015 opinion did not warrant
8 significant weight because Ms. Abbeduto was not an acceptable medical source. *See id.* (finding that
9 "this opinion" did not merit significant weight since Ms. Abbeduto was not an acceptable medical
10 source). The ALJ did not err in her evaluation of Ms. Abbeduto's opinions.

11 First, with respect to the 2013 opinion, the record includes notes from visits with Ms. Abbeduto
12 on October 1, 2013 and October 15, 2013. A.R. 521-22. On appeal, Plaintiff has identified no record
13 of any visit predating the 2013 opinion in which Dr. Pruitt met with Plaintiff. Nor has Plaintiff provided
14 records of any additional visits between Plaintiff and Ms. Abbeduto predating the 2013 opinion, instead
15 indicating that any such records are "missing." *See* Docket No. 18-1 at 25; *see also* A.R. 582 (statement
16 from Ms. Abbeduto submitted to Appeals Council). From this record, the Court cannot say that the ALJ
17 lacked substantial evidence in finding that the 2013 opinion was written after only two visits with Ms.
18 Abbeduto and after no visits with Dr. Pruitt. Moreover, the Ninth Circuit has recognized that it is proper
19 to discount even a treating physician's opinion if he has not seen the patient sufficiently to develop a
20 longitudinal picture. *Holohan v. Massanari*, 246 F.3d 1195, 1202 n.2 (9th Cir. 2001). The ALJ did not
21 err in discounting Ms. Abbeduto's 2013 opinion on this basis.

22 Second, with respect to the 2015 opinion, Plaintiff has failed to make any showing that the ALJ
23 erred, let alone that the ALJ erred in a manner that was not harmless. *Ludwig v. Astrue* 681 F.3d 1047,
24 1054 (9th Cir. 2012) (social security appellants have the burden of demonstrating error, in addition to
25 showing such error is not harmless). Here, Plaintiff indicates that "the record of evidence contains
26 treatment notes from November 12, 2013 to March 3, 2015, constituting at least 29 additional visits."
27 Docket No. 18-1 at 25. Absent from Plaintiff's argument, however, is any identification of any particular
28 aspect of those treatment notes showing that the ALJ erred in finding the extreme limitations identified

by Ms. Abbeduto's 2015 opinion were not supported by the treatment notes. Moreover, Plaintiff argues that Ms. Abbeduto was an acceptable medical source because Dr. Pruitt cosigned the 2013 opinion, *see* Docket No. 18-1; A.R. 383, but no argument or showing has been presented that such signature transforms Ms. Abbeduto into an acceptable medical source with respect to an opinion drafted two years later that Dr. Pruitt did not cosign, A.R. 571. Plaintiff has otherwise failed to show that the ALJ erred in finding that Ms. Abbeduto is not an acceptable medical source.³ The ALJ did not err in discounting Ms. Abbeduto's 2015 opinion on these bases.

The ALJ did not err in discounting Ms. Abbeduto's opinions.

E. Khalid Kamal

Plaintiff next argues that the ALJ erred in giving significant weight to consultative examiner Dr. Khalid Kamal because he did not possess evidence of Lyme disease when he rendered his opinion. Docket No. 18-1 at 25-26. The Commissioner counters that Dr. Kamal examined Plaintiff and opined as to her limitations, and she has failed to provide any medical evidence showing disability limitations stemming from her Lyme disease diagnosis. Docket No. 22 at 10. The Commissioner has the better argument. Plaintiff has failed to show that her submission of medical literature regarding possible limitations arising from Lyme disease rendered it improper for the ALJ to credit Dr. Kamal's findings based on his examination of Plaintiff.⁴

³ A Ninth Circuit decision establishes a possibility that a nurse practitioner's opinion may be treated as an acceptable medical source if she was working under a physician's close supervision such that she was acting as the physician's agent. *See Gomez v. Chater*, 74 F.3d 967, 971 (9th Cir. 1996). Plaintiff points to no evidence demonstrating such a relationship between Ms. Abbeduto and Dr. Pruitt. Moreover, in light of the subsequent removal of the regulatory provision relied upon in *Gomez*, the continued validity of this supervisory theory is unclear. *See Molina v. Astrue*, 674 F.3d 1104, 1111 n.3 (9th Cir. 2012) (noting repeal of regulation but declining to resolve continued validity of *Gomez*); *see also Casner v. Colvin*, 958 F. Supp. 2d 1087, 1097 (C.D. Cal. 2013) (finding that under current regulation, an "other source" cannot be treated differently "irrespective of her relationship to an acceptable medical source").

⁴ Plaintiff also challenges the ALJ's reliance on other sources, such as Dr. Elsie Villaflor. Docket No. 18-1 at 26-27. Dr. Villaflor reviewed the medical record evidencing Plaintiff's Lyme disease diagnosis and expressly acknowledged that diagnosis. A.R. 87, 93. Plaintiff has failed to show that the ALJ's reliance on such an opinion was improper based on her submission of medical literature regarding possible limitations arising from Lyme disease.

1 F. Adverse Credibility Finding as to Plaintiff's Testimony

2 Plaintiff next argues that the ALJ erred in discounting her testimony as not entirely credible.
3 Docket No. 18-1 at 27-29. The Commissioner counters that Plaintiff's testimony was properly
4 discounted based on its inconsistency with medical opinion evidence, Plaintiff's treatment history, and
5 activities of daily living, as well as the inconsistencies within Plaintiff's testimony. Docket No. 22 at
6 13-14. The Commissioner has the better argument.

7 The ALJ is required to engage in a two-step analysis to evaluate credibility: (1) determine
8 whether the individual presented objective medical evidence of an impairment that could reasonably be
9 expected to produce some degree of pain or other symptoms alleged; and (2) if the individual has
10 satisfied the first step of the test with no evidence of malingering, the ALJ may only reject the
11 individual's testimony about the severity of the symptoms by giving specific, clear, and convincing
12 reasons for the rejection. *See Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). To support a finding
13 of less than fully credible, the ALJ is required to point to specific facts in the record that demonstrate
14 that the individual's symptoms are less severe than she claims. *See id.* at 592. "Factors that an ALJ may
15 consider in weighing a claimant's credibility include reputation for truthfulness, inconsistencies in
16 testimony or between testimony and conduct, daily activities, and unexplained, or inadequately
17 explained, failure to seek treatment or follow a prescribed course of treatment." *Orn v. Astrue*, 495 F.3d
18 625, 636 (9th Cir. 2007) (internal quotation marks and citations omitted). If an ALJ's adverse credibility
19 determination is supported by substantial evidence, the courts should not second-guess that
20 determination. *Chaudhry v. Astrue*, 688 F.3d 661, 672 (9th Cir. 2012).

21 In this case, the ALJ provided sufficient reasons for discounting Plaintiff's testimony as to the
22 severity of her symptoms. For example, the ALJ relied significantly on the fact that Plaintiff engaged
23 in daily activities inconsistent with her claimed limitations. A.R. 36. Substantial evidence supports that
24 finding, *see, e.g.*, A.R. 52-57, and that is a proper basis on which to discount a social security claimant's
25 testimony, *see, e.g.*, *Rollins*, 261 F.3d at 857.

26 The ALJ did not err in discounting Plaintiff's testimony.
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1 G. Adverse Credibility Finding as to Third-Party Testimony

2 Plaintiff lastly argues that the ALJ erred in discounting the letters submitted by her friends.
3 Docket No. 18-1 at 29-30. The Commissioner counters that the letters were properly discounted because
4 the witnesses rarely saw Plaintiff and their assertions were largely duplicative of Plaintiff's own
5 discredited testimony. Docket No. 22 at 14-15. The Commissioner has the better argument.

6 In rejecting the testimony from lay witnesses, such as a claimant's family and friends, an "ALJ
7 need only give germane reasons." *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005). This
8 standard is "much lower" than the standard applicable to rejecting a claimant's own testimony. *Revels*
9 *v. Berryhill*, 874 F.3d 648, 655 (9th Cir. 2017). Indeed, if an ALJ provided clear and convincing
10 reasons for rejecting a claimant's subjective complaints, and lay testimony was similar to such
11 complaints, then it follows that the ALJ also gave germane reasons for rejecting the lay witness
12 testimony. *Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 694 (9th Cir. 2009).

13 The ALJ largely rejected the third-party letters because the witnesses rarely saw Plaintiff after
14 the alleged onset date. A.R. 35-36. There is substantial evidence supporting that conclusion, A.R. 278-
15 91, and an ALJ may permissibly discount third-party testimony on that basis, *Crane v. Shalala*, 76 F.3d
16 251, 254 (9th Cir. 1996). Moreover, the third-party witnesses provided allegations that largely
17 duplicated Plaintiff's own, so their testimony was properly rejected for the reasons already articulated
18 in discrediting Plaintiff's testimony. *See Valentine*, 574 F.3d at 694.

19 The ALJ did not err in discounting the third-party testimony.

20 **IV. CONCLUSION**

21 Judicial review of the Commissioner's decision to deny disability benefits is limited to
22 determining whether the decision is free from legal error and supported by substantial evidence. It is
23 the ALJ's responsibility to make findings of fact, draw reasonable inferences from the record, and
24 resolve conflicts in the evidence including differences of opinion. Having reviewed the Administrative
25 Record as a whole and weighed the evidence that supports and detracts from the conclusion, the
26 undersigned finds that the ALJ's decision is supported by substantial evidence under 42 U.S.C. § 405(g)
27 and the ALJ did not commit legal error.
28

1 Based on the forgoing, the undersigned hereby **RECOMMENDS** that Plaintiff's Motion for
2 Reversal and/or Remand (Docket No. 18) be **DENIED** and that Defendant's Cross-Motion to Affirm
3 (Docket No. 22) be **GRANTED**.

4 DATED: February 20, 2018

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6 
NANCY J. KOPPE
United States Magistrate Judge

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9 **NOTICE**

10 Pursuant to Local Rule IB 3-2 **any objection to this Report and Recommendation must be**
11 **in writing and filed with the Clerk of the Court within 14 days of service of this document.** The
12 Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to
13 the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This
14 circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly
15 address and brief the objectionable issues waives the right to appeal the District Court's order and/or
16 appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th
17 Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).
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